

STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of:

Xstrata Recycling Incorporated
1695 Monterey Highway
San Jose, California 95112

Respondent.

Docket HWCA20071539

ENFORCEMENT ORDER

Health and Safety Code
Section 25187

1. INTRODUCTION

1.1. Parties. The California Department of Toxic Substances Control (Department) issues this Enforcement Order (Order) to Xstrata Recycling Incorporated (Respondent).

1.2. Site. Respondent generates, handles, treats, stores, and/or disposes of hazardous waste at the following site: 1695 Monterey Highway, San Jose, California 95112 (Site).

1.3. Inspection. The Department inspected the Site on August 23, 2007.

1.4. Authorization Status. Respondent is a permitted treatment and storage facility. Respondent processes materials classified as scrap metal, excluded recyclable material, universal waste, hazardous waste and universal waste electronic devices. Respondent routinely accepts hazardous wastes and secondary materials containing recoverable quantities of base and precious metals. Respondent processes RCRA and non-RCRA waste for metal recovery either on-site or transfers the materials for off-site

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recovery at a primary smelter or other recovery facility. High value materials are routinely pre-processed at the San Jose facility and shipped to a smelter in Canada for final metal reclamation. Respondent is owned by Xstrata, a company located in Switzerland.

1.5. Jurisdiction. Health and Safety Code, section 25187, subdivision (a), authorizes the Department to order action necessary to correct violations and to assess a penalty when the Department determines that any person has violated specified provisions of the Health and Safety Code or any permit, rule, regulation, standard, or requirement issued or adopted pursuant thereto.

2. DETERMINATION OF VIOLATIONS

2.1. The Department has determined that:

2.1.1. Respondent violated California Code of Regulations, title 22, section 66264.143, in that during the period from November 10, 2007, to April 17, 2008, Respondent failed to submit a mechanism for financial assurance that was in compliance with the regulation, to wit, the financial test application submitted by Respondent failed to meet the requirements of California Code of Regulations, title 22, section 66264.143, subdivision (f)(3), as follows:

(a) The wording of the Financial Test and the Corporate Guarantee was not identical to that set forth at California Code of Regulations, title 22, section 66264.151(f) as required by California Code of Regulations, title 22, section 66264.143(f)(3)(A); and,

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(b) The Financial Test was signed by legal counsel rather than the Chief Financial Officer as required by California Code of Regulations, title 22, section 66264.143(f)(3)(A); and,

(c) The special report failed to include a statement from an independent certified public accountant that “no matters came to the independent certified public accountant's attention which caused that accountant to believe that the specified data should be adjusted” as required by California Code of Regulations, title 22, section 66264.143(f)(3)(C)(2).

2.1.2. Respondent violated California Code of Regulations, title 22, section 66264.147, in that during the period from November 10, 2007, to May 2, 2008, Respondent failed to submit a mechanism for financial assurance that was in compliance with the regulation, to wit, the financial test application submitted by Respondent failed to meet the requirements of California Code of Regulations, title 22, section 66264.147, subdivision (g), as follows:

(a) The wording of the Financial Test and the Corporate Guarantee was not identical to that set forth at California Code of Regulations, title 22, section 66264.151(h)(2) as required by California Code of Regulations, title 22, section 66264.147(g)(1); and,

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(b) The Financial Test was signed by legal counsel rather than the Chief Financial Officer as required by California Code of Regulations, title 22, section 66264.143(f)(3)(A), incorporated by California Code of Regulations, title 22, section 66264.147(g)(1); and,

(c) The special report failed to include a statement from an independent certified public accountant that “no matters came to the independent certified public accountant's attention which caused that accountant to believe that the specified data should be adjusted” as required by California Code of Regulations, title 22, section 66264.143(f)(3)(C)(2), incorporated by California Code of Regulations, title 22, section 66264.147(g)(1); and,

(d) The Corporate Guarantee submitted failed to identify a registered agent for service of process in the State of California as required by California Code of Regulations, title 22, section 66264.147(g)(2).

3. SCHEDULE FOR COMPLIANCE

3.1. Based on the foregoing Determination of Violations, IT IS HEREBY ORDERED THAT:

3.1.1. Respondent corrected the above violation on or about April 17 and May 2, 2008. Respondent shall maintain an acceptable financial assurance mechanism as required by regulation and without interruption.

3.1.2. Respondent shall comply with all terms, requirements, and conditions set forth in Section 5 (Penalty) below.

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3.2. Compliance with Applicable Laws. Respondent shall carry out this Order in compliance with all local, State, and federal requirements, including but not limited to requirements to obtain permits and to assure worker safety.

3.3. Endangerment during Implementation. In the event that the Department determines that any circumstance or activity (whether or not pursued in compliance with this Order) is creating an imminent or substantial endangerment to the health or welfare of people on the Site or in the surrounding area or to the environment, the Department may order Respondent to stop further implementation of this Order for such period of time as needed to abate the endangerment. Any deadline in this Order directly affected by a Stop Work Order under this paragraph shall be extended by the term of the Stop Work Order.

3.4. Liability. Nothing in this Order shall constitute or be construed as a satisfaction or release from liability for any conditions or claims arising as a result of past, current, or future operations of Respondent. Notwithstanding compliance with the terms of this Order, Respondent may be required to take such further actions as are necessary to protect public health or welfare or the environment.

3.5. Site Access. Access to the Site shall be provided at all reasonable times to employees, contractors, and consultants of the Department, and any other agency having jurisdiction. The Department and its authorized representatives shall have the authority to enter and move freely about all property at the Site at all reasonable times for purposes including but not limited to: inspecting records, operating logs, and

contracts relating to the Site; reviewing the progress of Respondent in carrying out the terms of this Order; and conducting such tests as the Department may deem necessary.

Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law.

3.6. Government Liabilities. Neither the State of California nor the Department shall be liable for injuries or damages to persons or property resulting from acts or omissions by Respondent, or related parties specified in paragraph 4.3, in carrying out activities pursuant to this Order. Neither the State of California nor the Department shall be held as a party to any contract entered into by Respondent or its agents in carrying out activities pursuant to the Order.

3.7. Extension Request. If Respondent is unable to perform any activity or submit any document within the time required under this Order, the Respondent may, prior to expiration of the time, request an extension of time in writing. The extension request shall include a justification for the delay.

3.8. Extension Approvals. If the Department determines that good cause exists for an extension, it will grant the request and specify in writing a new compliance schedule.

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4. OTHER PROVISIONS

4.1. Additional Enforcement Actions. By issuance of this Order, the Department does not waive any right to take further enforcement actions within its jurisdiction involving either Respondent(s) or the Site.

4.2. Penalties for Noncompliance. Failure to comply with the terms of this Order may subject Respondent to costs, penalties, and/or damages as provided by Health and Safety Code, section 25188, and other applicable provisions of law.

4.3. Parties Bound. This Order shall apply to and be binding upon Respondent, and its officers, directors, agents, employees, contractors, consultants, receivers, trustees, successors, and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations.

4.4. Privileges. Nothing in this Consent Agreement shall be construed to require any party to waive any privilege, including without limitation, attorney-client and attorney work-product. However, the assertion of any privilege shall not relieve any party of its obligations under this Consent Order.

4.5. Time Periods. "Days" for the purpose of this Order means calendar days.

5. PENALTY

5.1. Based on the foregoing DETERMINATION OF VIOLATIONS, the Department sets the amount of Respondent's penalty at \$94,806.00.

5.2. Payment is due within 30 days from the effective date of the Order.

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5.3. Respondent's check shall be made payable to the Department of Toxic Substances Control, and shall identify the Respondent and Docket Number, as shown in the heading of this case. Respondent shall deliver the penalty payment to:

Department of Toxic Substances Control
Accounting Office
1001 I Street, 21st floor
P. O. Box 806
Sacramento, California 95812-0806

A photocopy of the check shall be sent to:

Julie Mullins
Associate Governmental Program Analyst
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826-3200

and

James J. Grace
Senior Staff Counsel
Office of Legal Counsel
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826-3200

6. RIGHT TO A HEARING

6.1. Respondent may request a hearing to challenge the Order. Appeal procedures are described in the attached Statement to Respondent.

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7. EFFECTIVE DATE

7.1. This Order is final and effective twenty days from the date of mailing, which is the date of the cover letter transmitting the Order to Respondent, unless Respondent submits a written request for a hearing within the twenty-day period.

Date of Issuance: June 13, 2008 Department of Toxic Substances Control

Original signed by Keith Kihara
Keith Kihara
Supervising Hazardous Substances Scientist I
Enforcement and Emergency Response Program